

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SCOTT LEE SPANDEL,  
Petitioner,  
v.  
DOUG WADDINGTON,  
Respondent.

Case No. C04-5573RBL

## REPORT AND RECOMMENDATION

**NOTED FOR:**  
**April 1<sup>st</sup>, 2005**

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. Petitioner in this action is seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. (Dkt. # 7). Respondent has answered. (Dkt. # 17). This matter is ripe for review.

## FACTUAL BACKGROUND

Petitioner is in the custody pursuant to a 1999 Pierce County conviction for first degree robbery. He was sentenced to 159 months. The Washington courts summarized the facts as follows:

According to the testimony of Ericka Raboteau and Aaron Foushee, on May 2, 1999, Spandel, Raboteau, and Chad Hess took drugs (LSD), a backpack, some CD's, and approximately \$40 from Foushee by force. They testified that Hess displayed a knife over three inches in length during the robbery and that Spandel displayed a sawed-off shotgun and kicked Foushee in the face.

Foushee testified that the police promised they would not charge him with dealing or possessing drugs if he testified against Spandel. Raboteau testified that in exchange

1 for her testimony, the prosecutor reduced the first degree robbery charge against her  
 2 to first degree theft. Both Foushee and Raboteau testified that they had known each  
 3 other for several years and had dated in the past.

4 On the second day of trial, the State called Hess, who testified that Spandel was not  
 5 present during the robbery. But the State impeached Hess' testimony by introducing  
 6 his earlier statements to the police in which he told the police that Spandel had been  
 7 present at the robbery and had brandished a fake gun. Hess testified that he initially  
 8 implicated Spandel to avoid being arrested, but later, when he pleaded guilty to the  
 9 robbery, he asserted that Spandel had not been at the crime scene.

10 Following Hess' testimony, Spandel's counsel notified the court that he could not  
 11 locate two of Spandel's three alibi witnesses. He also informed the court that the third  
 12 witness, Daniel Laughlin, had been served with a subpoena but was not in court and  
 13 that he had been unable to contact Laughlin at work.

14 Spandel's counsel told the trial court that Laughlin was the only witness out of  
 15 approximately a dozen potential witnesses he had interviewed who had an adequate  
 16 recollection of May 2 and could corroborate Spandel's alibi. He requested that the  
 17 trial court allow him to call Laughlin as the first witness the next day. The trial court  
 18 offered to secure Laughlin's presence by arresting him and detaining him overnight.  
 19 Spandel's counsel said he would try to contact Laughlin and inform him that he  
 20 needed to appear the next day and that if he did not appear, the trial court would issue  
 21 an arrest warrant.

22 After the state rested, Spandel testified that he was at home caring for his invalid  
 23 mother on May 2. He testified that he was his mother's sole care provider from  
 24 November 1998 until his arrest, that the State paid him for this service, and that no  
 25 one else lived in their home during that time.

26 At the close of testimony that day, the trial court and the parties discussed the  
 27 "witness situation" off the record. Laughlin did not testify the following day, nor did  
 28 Spandel's counsel raise the subject of alibi witnesses again.

29 On the third day of trial, the State called Tiffany Eckles to rebut Spandel's testimony.  
 30 Eckles testified that she was a paid care provider from Pierce County Human Services  
 31 and shared the responsibility of caring for Mrs. Spandel with Spandel. She testified  
 32 that she began caring for Mrs. Spandel in February or March 1999, that she had  
 33 resided in the Spandel home since that time, and that the State had not paid Spandel  
 34 to care for his mother since she became Mrs. Spandel's caregiver earlier that year.

35 Eckles testified that she and Spandel alternated caring for Mrs. Spandel two days on  
 36 and two days off. Eckles indicated that she was not at the residence on May 12 when  
 37 the police arrested Spandel, but neither counsel asked her if she was there on May 2.  
 38 She also said that Spandel had contacted her and told her that she did not have to  
 39 testify unless she had received a subpoena.

40 The prosecutor made the following closing argument:

41 What is credible is that Scott Spandel went there with Chad Hess, with  
 42 Ericka Raboteau. Scott Spandel had a shotgun. Chad Hess had a knife,  
 43 and they, by force or threat of force, took property from Aaron  
 44 Foushee, and that's a robbery.

1 Let's look finally at the testimony of the defendant. The defendant said,

2 I wasn't there. I don't know Ericka. I don't know  
3 Aaron. I know Chad a little bit. But I wasn't there. I  
4 was busy at my State job taking care of my mother, of  
my disabled mother, cooking her breakfast, cooking her  
lunch and helping her 24-7 every day. I am her only  
care giver. I am completely responsible for her.

5 That was his testimony, and I submit to you that that testimony is not  
6 credible.

7 And make no mistake about who bears the burden in this case. The  
8 State does. The defendant doesn't have any obligation whatsoever to  
9 testify or present any evidence of any kind, no obligation. But once he  
10 does, once a defendant takes the stand, once the defendant puts on  
evidence for your consideration, once he decides to testify, you subject  
his testimony and his evidence to the same scrutiny as the State's  
evidence. The defendant gets the same scrutiny as the State does when  
he presents evidence.

11 His testimony is not credible. He is not his mother's paid care giver and  
12 he hasn't been all year. And he wasn't taking care of her on May 2nd.  
13 He wasn't there fixing her breakfast and lunch and helping her to the  
bathroom on May 2nd. Her care giver, Tiffany Eckles, who's an  
employee, who lives on the premises, was there.

14 (Dkt. # 17, pages 2 through 4).

15 Petitioner had testified that on the day of the robbery he slept most of the day and got up only  
16 to fix his mother breakfast and lunch. (Dkt. # 17, page 4).

17 The jury found petitioner guilty of first degree robbery and second degree assault but the  
18 assault charge was vacated. The court imposed a 75 month sentence with a 60 month consecutive  
19 firearm enhancement and a 24 month non deadly weapon enhancement for a total of 159 months.

#### PROCEDURAL HISTORY

21 The state supreme court summarized the procedural history:

22 On appeal to Division Two of the Court of Appeals, Mr. Spandel argued, among  
other things, that his counsel was ineffective in failing to ask Eckles whether she was  
working on May 2. He also claimed counsel ineffectively failed to call alibi witnesses.  
But because these claims involved matters outside the record, and because Mr.  
Spandel presented no affidavits showing what these witnesses would have said, the  
Court of Appeals rejected the claims.

26 Mr. Spandel subsequently filed a personal restraint petition in the Court of Appeals,  
repeating his claims of ineffective assistance and adding claims of prosecutorial  
27 misconduct and sentencing error. This time, he submitted affidavits from two claimed  
alibi witnesses, both of whom averred that the prosecutor had threatened to prosecute  
28

1 them for perjury if they testified. Mr. Spandel did not present an affidavit from Eckles,  
 2 however.

3 A panel of the Court of Appeals considered the petition on the merits and granted  
 4 relief on a sentencing issue. It rejected the ineffective assistance and prosecutorial  
 5 misconduct claims, however. Concerning the claim that counsel should have asked  
 6 Eckles whether she was working the day of the crime, the court noted that Mr.  
 7 Spandel had still not provided an affidavit showing what Eckles would have said had  
 8 she been asked her whereabouts.

9 Mr. Spandel then filed a motion for discretionary review in this court, providing for  
 10 the first time an affidavit from Eckles. In the affidavit, Eckles says that she was not  
 11 working the day of the crime and was not at Mr. Spandel's residence all that day. She  
 12 also avers that Mr. Spandel's mother required 24-hour care, and that Mr. Spandel was  
 13 the only other person who cared for her. In light of this affidavit, I directed the State  
 14 to respond to the motion for discretionary review. It has done so, and the motion is  
 15 now before me for determination.

16 (Dkt. # 18 exhibit 4). The state supreme court denied review on June 11<sup>th</sup>, 2003. (Dkt # 18 exhibit  
 17 4).

18 This habeas petition followed and petitioner raises two issues.

19

1. Ineffective assistance of counsel in violation of the Sixth Amendment  
 20 for his counsels failure to ask Eckles if she worked May 2<sup>nd</sup> and for  
 21 failing to call alibi witnesses Hofto and Laughlin.
2. Prosecutorial misconduct for threatening Hofto and Laughlin with  
 22 prosecution if they testified.

23 (Dkt. # 7).

24 STANDARD OF REVIEW

25 A habeas corpus petition shall not be granted with respect to any claim adjudicated on the  
 26 merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary  
 27 to, or involved an unreasonable application of, clearly established federal law, as determined by the  
 28 Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the  
 facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). Under the "contrary  
 to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion  
 opposite to that reached by the Supreme Court on a question of law or if the state court decides a  
 case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams v.  
Taylor, 120 S.Ct. 1495, 1523 (2000). Under the "unreasonable application" clause, a federal habeas  
 court may grant the writ if the state court identifies the correct governing legal principle from this

1 Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Id.

2 A determination of a factual issue by a state court shall be presumed correct, and the  
 3 applicant has the burden of rebutting the presumption of correctness by clear and convincing  
 4 evidence. 28 U.S.C. §2254(e)(1).

5 EVIDENTIARY HEARING

6 If a habeas applicant has failed to develop the factual basis for a claim in state court, an  
 7 evidentiary hearing may not be held in federal court unless (A) the claim relies on (1) a new rule of  
 8 constitutional law, made retroactive to cases on collateral review by the Supreme Court that was  
 9 previously unavailable, or (2) a factual predicate that could not have been previously discovered  
 10 through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to  
 11 establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder  
 12 would have found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2) (1996).

13 Petitioner's claims rely on established rules of constitutional law. Further, petitioner has not set forth  
 14 any factual basis for his claims that could not have been previously discovered or developed by due  
 15 diligence. Finally, the facts underlying petitioner's claims are insufficient to establish that no rational  
 16 factfinder would have found him guilty of the crime. Therefore, petitioner is not entitled to an  
 17 evidentiary hearing.

18 DISCUSSION

19 A. Ineffective assistance of counsel.

20 In order to establish ineffective assistance of counsel, a petitioner must show that counsel's  
 21 representation fell below an objective standard of reasonableness and that the deficient performance  
 22 affected the result of the proceeding. Strickland v. Washington, 466 U.S. 668, 686 (1984).

23 Under the first prong of the Strickland test, the question is whether counsel's assistance was  
 24 reasonable under the totality of the circumstances, viewed as of the time of counsel's conduct.  
 25 Strickland, 466 U.S. at 690. To succeed under the first prong, the petitioner must show the  
 26 attorney's conduct reflects a failure to exercise the skill, judgment, or diligence of a reasonably  
 27 competent attorney. United States v. Vincent, 758 F.2d 379, 381 (9<sup>th</sup> Cir.), cert. denied, 474 U.S.  
 28

1 838 (1985).

2 Under the second prong the petitioner must demonstrate prejudice. Strickland, 566 U.S. at  
 3 694. However, sheer outcome determination is not sufficient to make out a Sixth Amendment  
 4 violation. A proper prejudice inquiry focuses on whether counsel's errors or omissions rendered the  
 5 proceeding fundamentally unfair or the result unreliable. Lockhart v. Fretwell, 113 S.C. 838, 842-44  
 6 (1993).

7 Petitioners ineffective assistance of counsel claims fail under either prong. With regard to  
 8 failing to call alibi witnesses, both parties placed before the state court the affidavit of defense  
 9 counsel. Counsel avers the petitioner told him he was present when the robbery occurred and  
 10 counsel believed the calling of either alibi witness would have been unethical and suborning perjury.  
 11 (Dkt. # 18 exhibit 18 and 19, affidavit of Dana Ryan). Thus, counsels failure to call the alibi  
 12 witnesses was a tactical and ethical decision and not a failure on counsels part.

13 The state supreme court considered counsels failure to ask Ms. Eckles if she worked the day  
 14 of the robbery and held:

15 To establish a claim of ineffective assistance, Mr. Spandel must show, based on the  
 16 entire record, that counsel's conduct fell below an objective standard of  
 17 reasonableness and that, but for counsel's unprofessional errors, there is a reasonable  
 18 probability that the outcome of the trial would have been different. State v.  
McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Spandel must  
 19 overcome a strong presumption that counsel acted within the broad range of  
 20 reasonable professional conduct, and must show that there was no legitimate strategic  
 21 or tactical reason for the challenged conduct. Id. at 335-36. And since this is a  
 22 personal restraint petition, Mr. Spandel must demonstrate he was actually and  
 23 substantially prejudiced. In re Lord, 123 Wn.2d 296,303,868 P.2d 835 (1994).

24 Mr. Spandel shows neither unreasonable conduct nor prejudice in connection with  
 25 counsel's failure to ask Eckles her whereabouts on the day of the crime. Eckles had  
 26 already contradicted key parts of Mr. Spandel's testimony, and counsel legitimately  
 27 could have decided not to risk further damaging testimony by additional inquiry. And  
 28 even if counsel knew that Eckles would testify that she was gone the day of the crime,  
 he would have been placed in the untenable position of asking the jury to believe that  
 part of Eckles's testimony while disbelieving or discounting the part that contradicted  
 Mr. Spandel's testimony. Defense counsel made a reasonable tactical decision to attack  
 the credibility of the main witnesses (who dealt in or used illegal drugs).

And given the strength of the State's case and the fact that Eckles's testimony  
 significantly impeached Mr. Spandel, there is no reasonable probability the outcome  
 of the case would have been different had Eckles been asked her whereabouts. At  
 best, her testimony would have lent indirect support to Mr. Spandel's claim that he  
 was home the day of the crime, but it would not have directly accounted for his

whereabouts or established that he could not have been gone for the time it took to commit the robbery.

(Dkt. # 18 exhibit 4, pages 2 through 4).

Petitioner has failed to show the rulings of the state court to be contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. Further, petitioner has not shown the decision was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's ineffective assistance of counsel claim fails.

## B. Prosecutorial misconduct.

The relevant question in evaluating whether prosecutorial misconduct warrants habeas relief is whether the misconduct denied the defendant a fair trial. Prosecutorial misconduct would deny a defendant a fair trial if the action so infected the trial with unfairness as to make the resultant conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986).

Here, petitioner argues two alibi witnesses, Hofto and Laughlin, were contacted by the prosecutor and threatened with perjury charges if they testified. (Dkt. # 7). Both witnesses presented affidavits at the state court level. (Dkt. # 18 exhibit 19, attachments 1 and 2). The prosecutor denied having threatened either witness. (Dkt. # 18 exhibit 18, appendix "E").

The court need not consider the weight of the evidence or hold an evidentiary hearing. Petitioner can show no prejudice. Defense counsel has indicated that neither witness would have been called. (Dkt. # 18 exhibit 18 and 19, affidavit of Dana Ryan). As the witnesses would not have testified, petitioner can show no prejudice. This issue is without merit.

## **CONCLUSION**

Based on the foregoing discussion, the Court should **DISMISS** this petition as the petition lacks merit. A proposed order accompanies this report and recommendation.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule

1 72(b), the clerk is directed to set the matter for consideration on **April 1<sup>st</sup>, 2005**, as noted in the  
2 caption.

3

4 Dated this 8<sup>th</sup> day of March, 2005.

5

/S/ Karen L. Strombom  
6 Karen L. Strombom  
7 United States Magistrate Judge

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28